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Nos. 06-5618 and 06-5754

In the Supreme Court of the United States

MARIO CLAIBORNE, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

VICTOR A. RITA, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-guideline sentences?

TABLE OF CONTENTS

Page

Question Presented.. i

Table of Authorities. iii

Interest of *Amici Curiae*.. 1

Summary of Argument.. 1

Argument. 3

I. Institutional Resistance Has Hindered Implementation of *Booker*. 3

A. The Sentencing Commission.. 3

B. The Department of Justice.. 7

II. The Presumption of Reasonableness Skews Appellate Review in a Manner Inconsistent With *Booker*. 12

A. Statistical Overview. 12

B. Multiple Standards of Appellate Review. . 15

III. The Guideline Range Is Unworthy of a Presumption of Reasonableness Because, Under the Guidelines' Relevant Conduct Rules and Procedural Advice, the Guideline Range Frequently Rests on an Unreliable Factual Basis.. 22

Conclusion. 29

Appendix

TABLE OF AUTHORITIES

Page

CASES

Blakely v. Washington, 542 U.S. 296 (2004). . . 2, 28

Mistretta v. United States, 488 U.S. 361 (1989). . . 4

United States v. Andreano, 417 F.3d 967 (8th Cir. 2005). 23

United States v. Angleton, 2006 WL 2828657 (5th Cir. Sept. 28, 2006) (unpublished). 23

United States v. Barevich, 443 F.3d 956 (7th Cir. 2006). 24

United States v. Beal, 463 F.3d 834 (8th Cir. 2006) 17

United States v. Bobadilla-Diaz, 176 Fed. Appx. 858 (9th Cir. 2006). 24

United States v. Booker, 543 U.S. 220 (2005) . . . . . *passim*

United States v. Bullion, 466 F.3d 574 (7th Cir. 2006). 20

United States v. Cage, 458 F.3d 537 (6th Cir. 2006) 16

United States v. Cage, 451 F.3d 585 (10th Cir. 2006). 7, 16, 18

TABLE OF AUTHORITIES – Continued

Page

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United States v. Chau, 426 F.3d 1318 (11th Cir. 2005).. 24

United States v. Claiborne, 439 F.3d 479 (8th Cir.), *cert. granted in part*, 127 S. Ct. 551 (2006). 7, 16, 18

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United States v. Daniel, 178 Fed. Appx. 345 (5th Cir. 2006). 24

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United States v. Davis, 2006 WL 3267349 (4th Cir. Nov. 13, 2006) (unpublished).. 16

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TABLE OF AUTHORITIES – Continued

Page

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United States v. Fanfan, 468 F.3d 7 (1st Cir. 2006) 23

United States v. Faust, 456 F.3d 1342 (11th Cir. 2006). 22

United States v. Favorite, 2006 WL 3231470 (5th Cir. Nov. 8, 2006) (unpublished). 16

United States v. Flores-Flores, 2006 WL 2269879 (9th Cir. Aug. 2, 2006) (unpublished). 24

United States v. Gatewood, 438 F.3d 894 (8th Cir. 2006). 21

United States v. Gonzalez, 2006 WL 3375360 (7th Cir. Nov. 22, 2006) (unpublished). 16

United States v. Gonzalez, 462 F.3d 754 (7th Cir. 2006). 20

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TABLE OF AUTHORITIES – Continued

Page

United States v. Hall, 109 F.3d 1227 (7th Cir. 1997) 24

United States v. Hampton, 441 F.3d 284 (4th Cir. 2006).. 18

United States v. Hayes, 2006 WL 3456383 (4th Cir. Nov. 30, 2006) (unpublished).. . . . . 14, 18

United States v. Hodge, ___ F.3d ____, 2006 WL 3373113 (8th Cir. Nov. 22, 2006) 17

United States v. Humphrey, 2006 WL 3257883 (8th Cir. Nov. 13, 2006) (unpublished). 16

United States v. Jackson, ___ F.3d ____, 2006 3436038 (6th Cir. Nov. 30, 2006). 25

United States v. Jardine, 364 F.3d 1200 (10th Cir. 2004).. 23

United States v. Jiménez-Beltre, 440 F.3d 517 (1st Cir. 2006). 8, 11

United States v. Johnson, 445 F.3d 339 (4th Cir. 2006).. . . . . 7, 16

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Page

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United States v. Mares, 402 F.3d 511 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005). 16

United States v. Martinez, 413 F.3d 239 (2d Cir. 2005).. 24

United States v. McDonald, 461 F.3d 948 (8th Cir. 2006).. 13

United States v. Meyer, 452 F.3d 998 (8th Cir. 2006).. 13

United States v. Minter, 2006 WL 3018109 (4th Cir. Oct. 23, 2006) (unpublished).. 23

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Page

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United States v. Myers, 439 F.3d 415 (8th Cir. 2006).. 14

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005).. 16

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United States v. Peach, 356 F. Supp. 2d 1018 (D.N.D. 2005).. 7

United States v. Perez, 183 Fed. Appx. 477 (5th Cir. 2006). 25

United States v. Pisman, 443 F.3d 912 (7th Cir.), *cert. denied*, 127 S. Ct. 413 (2006). 20

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TABLE OF AUTHORITIES – Continued

Page

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United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005). 5

United States v. Rashaw, 170 Fed. Appx. 986 (8th Cir. 2006). 22

United States v. Reinhart, 442 F.3d 857 (5th Cir.), *cert. denied*, 127 S. Ct. 131 (2006). 19, 21

United States v. Romero, ___ F.3d ____, 2006 WL 3530656 (7th Cir. Dec. 8, 2006). 23

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TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 2006 WL 3068667 (5th Cir. Oct. 26, 2006)..... 23

United States v. Stewart, 185 Fed. Appx. 276 (4th Cir. 2006)..... 23

United States v. Taylor, 184 Fed. Appx. 870 (11th Cir.), *cert. denied*, 127 S. Ct. 311 (2006)..... 26

United States v. Terrell, 445 F.3d 1261 (10th Cir. 2006)..... 7, 16

United States v. Terry, 916 F.2d 157 (4th Cir. 1990) 25

United States v. Thorpe, 447 F.3d 565 (8th Cir. 2006)..... 18, 24, 28

United States v. Vaughn, 430 F.3d 518 (2d Cir. 2006)..... 23

United States v. Vazquez-Rivera, ___ F.3d ____, 2006 WL 3593482 (1st Cir. Dec. 12, 2006)..... 9

United States v. Wallace, 458 F.3d 606 (7th Cir. 2006)..... 20

United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005) 5

United States v. Wilson, 350 F. Supp. 2d 1269 (D. Utah 2005)..... 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Winters, 416 F.3d 856 (8th Cir. 2005).. 21

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Washington v. Recuenco, ___ U.S. ____, 126 S. Ct. 2546 (2006). 28

STATUTES AND RULES

18 U.S.C. § 3553. . . . . *passim*

S. Ct. Rule 37.6. 1

U.S. SENTENCING COMMISSION MATERIALS

U.S.S.G. App. C (Nov. 2005).. 4

U.S.S.G. Ch. 1 (1987). 11

U.S.S.G. § 1B1.3. 22

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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OTHER

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, save the two representing Petitioners in this matter. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts, and we represent thousands of individuals who are sentenced each year. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their attorneys and other staff. The issues presented in these cases are of obvious importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

As daily participants in federal sentencing, *amici* offer an accounting, both statistical and anecdotal, of sentencing practices in district and appellate courts after *United States v. Booker*, 543 U.S. 220 (2005). The sum of that accounting is troubling and drives our view that the Guidelines should not be accorded a presumption of reasonableness.

Our experience is that the presumption of reasonableness for within-guideline sentences reflects institutional resistance to *Booker*, and that the circuits that

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[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. S. Ct. Rule 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

have adopted it have lost sight of the fundamental rationale of *Booker* and of *Blakely v. Washington*, 542 U.S. 296 (2004). The Constitution forbids the equivalent of conviction without the fundamental components of the adversary system the Framers intended. After *Booker*, guideline ranges continue to be increased based on information that has not been charged, has not been proven, has not been subject to confrontation, and in many cases comes from unreliable sources. Under such circumstances, it is wrong to afford sentences that fall within guideline ranges a presumption of reasonableness, as seven courts of appeals do.

In turn, presumption circuits over-emphasize the role of the Guidelines in sentencing decisions. As a result, attempts by sentencing judges to take into account the good in a defendant's life history when imposing punishment, an exercise clearly contemplated by *Booker*, are rebuffed as contrary to the Guidelines' view that such considerations are to be discouraged, or are "not ordinarily relevant," or are not relevant at all. But these same circuits apply a different, highly deferential standard of review to sentences above guideline ranges. The use of multiple standards of review in presumption circuits is contrary to *Booker*, which held that sentences are to be reviewed for reasonableness "across the board." *Booker*, 543 U.S. at 263. Thus, presumption circuits have, *de facto*, adopted a system that "impose(s) Guideline-type limits upon a judge's ability to reduce sentences, but . . . [does] not impose those limits upon a judge's ability to *increase* sentences," a "one-way lever[]" that was flatly rejected by this Court. *Id.* at 266 (emphasis in original).

Because the presumption of reasonableness acts as a one-way ratchet and allows sentencing ranges based on unreliable factual determinations, it is contrary to *Booker* and should be rejected.

ARGUMENT

I. INSTITUTIONAL RESISTANCE HAS HINDERED IMPLEMENTATION OF *BOOKER*.

The discussion of post-*Booker* data and cases that follows in Parts II and III is illuminated by reviewing the political context that gave rise to the presumption of reasonableness. In the wake of *Booker*, the Sentencing Commission and the Department of Justice (DOJ) acted swiftly to advance the argument that the Guidelines should be presumed reasonable because they already incorporate all of the purposes and factors in 18 U.S.C. § 3553(a), and other congressional directives. While this argument was no more than *ipse dixit*, it took hold, and spawned the presumption of reasonableness.

A. The Sentencing Commission.

In the nearly two years since *Booker* was decided, it has yet to be mentioned in the *Guidelines Manual*. The Guidelines have been amended five times since January 12, 2005. Amendments adopted since *Booker* include changes, generally resulting in higher penalties, to a wide range of crime including child pornography, possession of steroids, copyright violations, firearms and immigration offenses. Some were made at the direction of Congress, many others came of the Commission's own accord. Some were "technical and conforming amendments to various

Guidelines" (*e.g.*, U.S.S.G. App. C, amends. 679-680), and others were passed to address "problematic areas" and "issues" pertaining to Guideline applications (*e.g.*, *id.*, amends. 684, 691, 692). Yet *Booker*, described as "the most significant case affecting the federal sentencing guidelines system since . . . *Mistretta* [*v. United States*, 488 U.S. 361 (1989)],"[2] was left unaddressed.

This inattention to *Booker* in the *Guidelines Manual* is significant. The *Guidelines Manual* is the source of information used for guideline calculations. Guideline calculations remain a component of the sentencing process and have primary significance in presumption circuits. U.S.S.G. § 5K2.0 describes the Commission's approach to a sentencing judge's departure authority. Relying on 18 U.S.C. § 3553(b)(1), § 5K2.0 severely limits a court's authority to sentence below guideline ranges. However, 18 U.S.C. § 3553(b)(1) was severed and excised in *Booker*. Yet, § 5K2.0 remains in the *Guidelines Manual* intact, "advising" against departures except in the rarest of cases, even though that advice rests on a statute that was voided as unconstitutional. And that advice is invoked time and again against defendants in circuits that accord the Guidelines a presumption of reasonableness.

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[2] Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U. S. House of Representatives, March 16, 2006 (hereinafter "Testimony of Hinojosa, J., March 16, 2006"), available at http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf.

The Commission has acted to advance its position that *Booker* changed little. On February 10, 2005, the Commission offered testimony to the House Judiciary Committee's Subcommittee on Crime.[3] The Commission recognized an emerging conflict in the courts as to how to interpret *Booker*. One view would accord the Guidelines substantial weight in the sentencing process. The other would treat the Guidelines as one of a number of sentencing factors.[4] The Commission lined up with the former, asserting that "the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a)," and that the Commission "has considered the factors listed at § 3553(a)." Thus, the Commission argued, the Guidelines should be given "substantial weight" in the sentencing decision.[5] The Commission disseminated its position to

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[3] Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, February 10, 2005 (hereinafter "Testimony of Hinojosa, J., February 10, 2005"), available at http://www.ussc.gov/Blakely/bookertestimony.pdf

[4] The conflict referenced was that exemplified in *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) and *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

[5] Testimony of Hinojosa, J., February 10, 2005, *supra*, note 3.

judges, probation officers, and prosecutors across the country in training presentations and written materials.[6]

The very language used at the February 10, 2005, hearing soon appeared verbatim in an Eleventh Circuit opinion. "Indeed, the factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under *Booker* and § 3553(a)." *United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005).

On March 16, 2006, the Commission again appeared before the House Judiciary Committee's Subcommittee on Crime to propose a legislative response to *Booker* which would accord the Guidelines substantial weight. In support of its proposal, the Commission cited *Shelton* for the proposition that "the factors set forth in 3553(a)(2) . . . are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a)," asserting that "the sentencing guidelines embody all of the applicable sentencing factors for a given

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[6] U.S. Sentencing Commission, *Post-Booker Guidelines Training 2006*, Tab 1 ("guidelines consider" each listed purpose and factor), Tab 7 (containing Testimony of Hinojosa, J., February 10, 2005), on file with author; U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (Mar. 2006) ("training program explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences post-*Booker*"), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

offense and offender."[7] This tautology has provided the primary justification for the presumption of reasonableness.[8]

B. The Department of Justice.

After *Booker*, DOJ swiftly adopted policies "advocating the consistent application of the Sentencing Guidelines."[9] On January 28, 2005, a directive to line Assistant United States Attorneys was issued that said prosecutors (1) "must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases," (2) "must oppose" any sentence that "is below what the United States believes is the appropriate Sentencing Guidelines range," and (3) must report "sentences outside the appropriate Sentencing Guideline range."[10] At the same time, DOJ was looking to

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[7] Testimony of Hinojosa, J., March 16, 2006, *supra*, note 2.

[8] *See, e.g., United States v. Cage*, 451 F.3d 585 (10th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir.), *cert. granted in part*, 127 S. Ct. 551 (2006); *United States v. Peach*, 356 F. Supp. 2d 1018, 1021 (D.N.D. 2005).

[9] Memorandum to All Federal Prosecutors from James B. Comey, Deputy Attorney General, January 28, 2005, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_Jan_28_comey_memo_on_ booker.pdf.

[10] *Id.*

Congress for a legislative response to *Booker*.[11] The government favored a "topless" or "minimum" Guidelines approach. In the form proposed by DOJ to the House Judiciary Committee hearing on March 16, 2006, "the sentencing guidelines minimum would return to being mandatory and again have the force of law, while the guidelines maximum sentence would remain advisory."[12]

Congress has taken no action. However, the combination of the Commission's and DOJ's advancement of the view that the Guidelines already account for § 3553(a) factors, and periodic threats of a legislative "fix," has stymied the development of sentencing law faithful to the principles in *Booker*.[13]

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[11] *See* Testimony of Christopher A. Wray, Assistant Attorney General, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, February 10, 2005, available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf; Prepared Remarks of Attorney General Alberto Gonzales, Sentencing Guidelines Speech, Washington, D.C., June 21, 2005, available at http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm.

[12] Testimony of William W. Mercer, Principal Associate Deputy Attorney General, Before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006, at 7, available at http://judiciary.house.gov/media/pdfs/mercer031606.pdf.

[13] Examples of how judicial concern over a legislative response to *Booker* influences sentencing decisions are found in *United States v. Wilson*, 350 F. Supp. 2d 1269, 1287-88 (D. Utah 2005); *United States v. Jiménez-Beltre*, 440 F.3d 517 (1st Cir. 2006) (Howard, J.,

The idea that the Guidelines account for all of the § 3533(a) factors is a matter of continuing concern in the district courts. Representative of that concern is *United States v. Raby*, where the sentencing judge lamented that he could not consider the age, mental health, and employment record of the defendant in imposing sentence. The court observed:

> I may not consider [age] without going against a presumption that the guideline is reasonable that tells me I can't consider age, that you will be 60 when you get out of prison. So, I can't talk – I can't do that.
>
> * * *
>
> Should I consider the fact that he is different from a youth and has never been convicted of a crime until he is 42, I would be branching into an area that the Sentencing Guidelines and their policy judgments seem to circumscribe and prohibit.
>
> So, someone with a Category I at age 17 is the same as a Category I, no criminal history, at age 60. So, the fact you live a

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concurring); *United States v. Grigg*, 442 F.3d 560 (7th Cir. 2006); *United States v. Vazquez-Rivera*, ___ F.3d ____, 2006 WL 3593482 (1st Cir. Dec. 12, 2006); and *United States v. Lopez-Cerda*, SA-05-CR-057, Transcript of Sentencing (W.D. Tex. July 6, 2005), available at www.fd.org/Lopez-CerdaTranscript7.6.05.pdf.

> law-abiding life and have never been convicted of a crime is treated exactly the same when you're 60 as it is when you're 20 under the Guidelines.

United States v. Raby, CR No. 2:05-00003, Transcript of Sentencing 22-23 (S.D. W. Va. Sept. 27, 2006), available at www.fd.org/ RabyTranscript9.27.06.pdf.

On the issue of employment, the court offered:

> Mr. Raby has been employed full-time for his adult life. But the Guidelines say it's reasonable for me not to pay a bit of attention to that. I am not to pay any attention to the fact that he has been a contributing member of society, has worked and eared a living. I'm not supposed to pay any attention to that because, as the Government argues, that's all taken care of by the Guidelines; the Guidelines are always reasonable about that.
>
> So, somebody that doesn't do a darn thing, lives a life of sloth and disrepute with regard to their employment, at least, is treated exactly the same as someone who works hard all their life. And it's not relevant for sentencing if one is to be reasonable, presumptively reasonable under the Guidelines.

Id. at 24.

And on mental health and the right to allocute:

> So, the fact that there are mental and emotional conditions which are clear in this case and inherent in cases such as this are not anything I can think about.
>
> I can't even, I suppose, take into account in that regard, or at least the Guidelines – I don't know why we have the right of allocution. This man made what I consider to be an extremely sincere statement. He's been truthful all along. He admits his sick and perverted view of children. But he's there under oath today and promises that he would not do it again no matter how tempted he would be to view child pornography.

Id. at 25.

Such frustrated colloquies are not atypical. Were the assertion underlying the presumption of reasonableness valid, this would not happen. But it is not. The Guidelines do not incorporate other § 3553(a) factors because the Guidelines cannot account for "the vast range of human conduct potentially relevant to a sentencing decision." U.S.S.G. Ch. 1, pt. A(a), (b) (1987). They are "inescapably generalizations" that "say little about the 'history and characteristics'" of our clients, except insofar as they "prohibit consideration of certain individualized factors [and] discourage – except in 'exceptional cases' – consideration of other individualized factors." *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006)

(Lipez, J., dissenting). The presumption of reasonableness promotes Guideline calculations to a position more important than the lives of our clients, producing a body of troubling case law.

II. THE PRESUMPTION OF REASONABLENESS SKEWS APPELLATE REVIEW IN A MANNER INCONSISTENT WITH *BOOKER*.

A review of sentencing and sentencing appeal data post-*Booker* shows predictable trends. Defendants are denied meaningful sentencing consideration of their individual circumstances in presumption circuits. When judges attempt to take into account a defendant's life history in imposing below-guideline sentences in presumption circuits, the risk of reversal is astonishingly high; meanwhile, sentences above guideline ranges are rarely reversed. This happens because, contrary to *Booker*, presumption circuits apply differing standards of review to sentences within, below, and above the guideline range. The data and caselaw emphatically demonstrate this point.

A. Statistical Overview.

The gap between the rate of below-guideline sentences imposed by district courts in circuits that have returned the Guidelines to their presumptive status and that in circuits that have declined to do so has steadily widened. *See* Difference in Rates of Below-Guideline Sentences Imposed 1/12/05-11/27/06 (App. A-1). As of November 27, 2006, the rate in non-presumption circuits exceeded that in presumption circuits by 34.2%. *Id.* This gap is alarming and is clear evidence that, by presuming

that the Guidelines incorporate § 3553(a) purposes and factors when they do not, courts deny defendants consideration of mitigating life circumstances in the sentencing decision.

As dramatic as is this gap between below-guideline sentences imposed in presumption and non-presumption circuits, the pattern in the courts of appeals is even more disturbing. Below-guideline sentences appealed by the government were reversed in 78.3% of cases. In contrast, above-guideline sentences appealed by defendants were reversed in only 3.5% of cases, and within-guideline sentences appealed by defendants were reversed in a mere 1.4% of cases. *See* Court of Appeals Review 12/1/05-11/30/06 (hereinafter "Court of Appeals Review"), App. A-5, A-8.[14] Thus, any newfound discretion that judges may have appears to be "an escalator that only goes up," *United States v. McDonald*, 461 F.3d 948, 959 (8th Cir. 2006) (Bye, J., dissenting), creating unwarranted disparity, *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006) (Heaney, J., concurring), contrary to this Court's rejection of such one-way levers. *Booker*, 543 U.S. at 266.

In presumption circuits, 86.2% of below-guideline sentences appealed by the government were reversed, as compared to 60% in non-presumption circuits. Court of

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[14] The entire compilation of appeals court decisions used in preparing the comparative analyses included in the Appendix at A-5 – A-17 is posted at Court of Appeals Review 12/1/05–1/30/06, available at www.fd.org/CourtofAppealsReview12.1.05-11.30.06.pdf.

Appeals Review, App. A-10. In the Fourth Circuit, where Victor Rita was sentenced, 100% of below-guideline sentences were reversed and 100% of within-guideline sentences were affirmed. In the Eighth Circuit, where Mario Claiborne was sentenced, 92.9% of below-guideline sentences were reversed and 98.8% of within-guideline sentences were affirmed. *Id.*, App. A-9.

The presumption circuits attempt to distinguish the post-*Booker* presumption of reasonableness from the presumptive guideline system held unconstitutional in *Booker* by claiming that it does not mean that a sentence *outside* the guideline range is presumptively *unreasonable*. *See, e.g., United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006); *United States v. Hayes*, 2006 WL 3456383, at *1 (4th Cir. Nov. 30, 2006) (unpublished). Statistical analysis of the decisions of presumption circuits belies that contention. Over 20% of outside-guideline sentences have been reversed, while less than 1% of within-guideline sentences have been reversed. *See* Court of Appeals Review, App. A-10. This is significantly different than the treatment of appeals of outside-guideline sentences in non-presumption circuits, where only 8.7% were reversed. *Id.*

Given the widespread view among the judiciary that the Guidelines do not comply with 18 U.S.C. § 3553(a), produce sentences that are too severe, and fail to allow individualized sentencing,[15] one would expect to see a very

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[15] *See* U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Executive Summary ES-1-8 (Feb. 2003), available at http://www.ussc.gov/judsurv/judsurv.htm.

different trend were the law faithfully being followed. Instead, the pattern of appellate guideline enforcement and the periodic demands for a legislative fix, *see* nn. 7, 11-12 and accompanying text, *supra*, have "preserve[d] *de facto* mandatory Guidelines by discouraging district courts from sentencing [below] Guidelines ranges" and from following the sentencing law. *See Booker*, 543 U.S. at 313 (Scalia, J., dissenting in part).

B. Multiple Standards of Appellate Review.

The presumption circuits employ differing standards of review depending on whether the appeal is from a sentence within, below, or above the guideline range. The differing standards have the effect of enforcing the guideline range as under pre-*Booker* law, but are far more permissive of above-guideline sentences than under pre-*Booker* law. This stands the parsimony requirement of § 3553(a) on its head,[16] is contrary to the command in *Booker* that one standard of review – for "unreasonableness" – be applied "across the board," *Booker*, 543 U.S. at 263, and "irrespective of whether the trial judge sentences within or outside the Guidelines range," *id.* at 260, and operates as the one-way lever this Court found to be incompatible with congressional intent, *id.* at 266.

When reviewing within-guideline sentences, the presumption circuits begin with the proposition that a within-guideline sentence incorporates the purposes of

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[16] "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a).

sentencing and all relevant factors set forth in § 3553(a). *See United States v. Cage*, 458 F.3d 537, 542-43 (6th Cir. 2006); *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006); *United States v. Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339, 343 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir.), *cert. granted in part*, 127 S. Ct. 551 (2006); *accord United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Mares*, 402 F.3d 511, 517-18 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005).[17] If the guideline range was calculated correctly, affirmance inexorably follows. *See, e.g., United States v. Davis*, 2006 WL 3267349, at *1 (4th Cir. Nov. 13, 2006) (unpublished); *United States v. Favorite*, 2006 WL 3231470, at *1 (5th Cir. Nov. 8, 2006) (unpublished); *United States v. Gonzalez*, 2006 WL 3375360, at *1 (7th Cir. Nov. 22, 2006) (unpublished); *United States v. Humphrey*, 2006 WL 3257883, at *2 (8th Cir. Nov. 13, 2006) (unpublished); *United States v. Lopez-Flores*, 444 F.3d 1218, 1222-23 (10th Cir. 2006).

Review of below-guideline sentences, however, is difficult to distinguish in substance from *de novo* review of downward departures as before *Booker*. In derogation of § 3553(a)'s express command that the district court "shall consider" the history and characteristics of the defendant and the circumstances of the offense in determining what

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[17] The D.C. Circuit has merely said that it adopts a presumption of reasonableness as its sister circuits have done. *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir.), *cert. denied*, 2006 WL 3037643 (U.S. Nov. 27, 2006).

"particular sentence" is sufficient but not greater than necessary to satisfy the purposes of sentencing, presumption circuits preclude or strongly discourage consideration of such factors based on the *Guidelines Manual*'s policy statements. *See, e.g., United States v. Simmons*, ___F.3d ____, 2006 WL 3365654, at *14-15 (5th Cir. Nov. 21, 2006) (cautioning in its "supervisory capacity as well as to assist the district court on remand," that while the sentencing court originally considered the age of the defendant, it should be aware of the Guidelines policy statement that age "is not ordinarily relevant" and must be prepared to "explain why the prohibited or discouraged factor, as it relates to the defendant, is so extraordinary that the policy statement should *not* apply") (emphasis in original); *United States v. Duhon*, 440 F.3d 711, 716-17 & n.4 (5th Cir. 2006) (below-guideline sentence unreasonable because it "deviates from a relevant advisory Guideline disallowing probation" and so "varies, not only from the applicable guideline range, but also from the 'kinds of sentence' available under the Guidelines"; it "diverges from a policy statement prohibiting the consideration of physical condition"; and it "should have similarly addressed the policy statement discouraging [family circumstances] as a ground for departure"); *United States v. Hodge*, ___ F.3d ____, 2006 WL 3373113, at *5 (8th Cir. Nov. 22, 2006) (drug addiction is an "improper or irrelevant" factor because it is prohibited by U.S.S.G. § 5H1.4, p.s.); *United States v. Beal*, 463 F.3d 834, 837 (8th Cir. 2006) (variance from career offender guideline based on the fact defendant had never served any jail time was error because U.S.S.G. § 4A1.3, p.s., prohibits more

than one point off a career offender sentence); *United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (vacating sentence based on defendant's role as sole caretaker for two young children because a departure for family ties and responsibilities would not have been allowed under the Guidelines).

Moreover, the presumption circuits sometimes directly substitute their own judgment for that of sentencing judges, ordering specific sentences to be imposed on remand. *See, e.g., United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006) ("remand[ing] for resentencing at the low end of the sentencing range (seventy-eight months) on Count Two and to a consecutive sixty-month sentence on Count Three"), *petition for cert. filed* June 20, 2006 (No. 05-11659) ; *United States v. Thorpe*, 447 F.3d 565, 569 (8th Cir. 2006) (remanding for "a determination of the drug quantity under a preponderance of the evidence standard" and "for the imposition of a sentence commensurate with the drug quantity determination").

When reviewing below-guideline sentences, presumption circuits consistently require a more compelling reason the further a below-guideline sentence "varies," "diverges," or "deviates" from the guideline range. *See, e.g., Claiborne*, 439 F.3d at 481; *United States v. Hayes*, 2006 WL 3456383, at *1 (4th Cir. Nov. 30, 2006) (unpublished); *United States v. Davis*, 458 F.3d 491, 496 (6th Cir. 2006); *Cage*, 451 F.3d at 594-95; *Duhon*, 440 F.3d at 715; *United States v. Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005), *cert. denied*, 2006 WL 985745 (U.S. Apr. 17, 2006); *United States v. Dean*, 414 F.3d 725,

729 (7th Cir. 2005). This standard requires sentences that are closely tethered to the guideline range but bear no relation to the purposes of sentencing applied with parsimony.

In sharp contrast is the perfunctory review applied by presumption courts to above-guideline sentences. Sentences that admittedly create unwarranted disparity and overstate the seriousness of the offense, and would be reversed if below the guideline range, are left undisturbed. *See, e.g.*, *United States v. Reinhart*, 442 F.3d 857, 864 (5th Cir.) (concluding sentence 84 months above top of guideline range was reasonable though sentencing court "did not consider the need to avoid unwarranted sentence disparities among similarly-situated defendants . . . [and defendant's] sentence is undoubtedly longer than that received by other similar defendants"), *cert. denied*, 127 S. Ct. 131 (2006); *United States v. Saldana*, 427 F.3d 298, 316 (5th Cir.) ("[g]iven the deference we owe to the district court, we will not overturn the extent of the [400%] upward departure here as unreasonable" though it "overstates the harm done to the victims" and "is significantly longer than those imposed in similar 'tax protestor' cases"), *cert. denied*, 126 S. Ct. 810 (2005); *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006) (affirming 300% increase above guideline range based on factors already taken into account by the criminal history rules because a "defendant's criminal history is one of the factors that a court may consider in imposing a non-Guideline sentence" and rejecting defendant's argument that the sentence was unreasonable because of unwarranted disparity).

As Judge Bye of the Eighth Circuit observed: "In this [above-Guideline] case, the district court only perfunctorily indicated it had 'considered' the § 3553(a) factors. If we pretend, for a moment, this case were one in which the Guidelines called for a sentence of twenty-four months at the low end of the advisory range, and the district court had departed *downward* 400% to six months, with the same spare comments about consideration of the § 3553(a) factors, I seriously doubt the district court's decision would have survived our appellate review." *United States v. Zeigler*, 463 F.3d 814, 820-21 (8th Cir. 2006) (Bye, J., concurring) (emphasis in original).

The Seventh Circuit has issued a warning to defendants that appeals of within- and above-guideline sentences are "frivolous." *United States v. Bullion*, 466 F.3d 574, 575 (7th Cir. 2006) (defendant's appeal of 264-month sentence, which was 39 months above top end of the guideline range, was "frivolous," and "[t]here was no basis for the defendant's challenging the exercise of discretion by the sentencing judge in this case – and, we add in cases like it"); *United States v. Gonzalez*, 462 F.3d 754, 755 (7th Cir. 2006) (asking defendants not to "confuse a debatable sentence with an unreasonable one and . . . waste their time and ours by filing frivolous appeals"). No such warning has been issued to the government regarding below-guideline sentences. Instead, the Seventh Circuit carefully scrutinizes and frequently reverses those sentences. *See, e.g., United States v. Wallace*, 458 F.3d 606, 612-14 (7th Cir. 2006); *United States v. Pisman*, 443 F.3d 912, 920 (7th Cir.), *cert. denied*, 127 S. Ct. 413 (2006).

In addition, some presumption circuits have produced two different statements of the law depending on whether the sentence was above or below the guideline range. Affirming an *above*-guideline sentence, the Eighth Circuit rejected the argument "that the range of reasonableness is essentially co-extensive with the Guidelines range" because such a rule "would effectively render the Guidelines mandatory." *United States v. Winters*, 416 F.3d 856, 861 (8th Cir. 2005). Later, reversing a *below*-Guideline sentence, the Eighth Circuit concluded that the Guidelines are presumptively reasonable because they "are fashioned taking the other [18 U.S.C.] § 3553(a) factors into account and are the product of years of careful study." *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006). The Fifth Circuit, too, uses remarkably different language to describe its review depending on whether the sentence was above or below the guideline range. *Compare Reinhart*, 442 F.3d at 864 (affirming above-guideline sentence because the "guidelines are merely one sentencing factor among many," and "we therefore decline to give the guidelines the quasi-mandatory status urged by Reinhart") *with Duhon*, 440 F.3d at 717-21 (reversing below-guideline sentence because district court improperly relied on factors prohibited and discouraged by the Guidelines' policy statements "without explaining its deviation").

The data and case review above demonstrate that according a presumption of reasonableness to within-guideline sentences has the effect of subjecting below-guideline sentences to strict scrutiny tied to the Guidelines' range and policy statements, as under the standard of

review for departures excised in *Booker*. In contrast, within-guideline sentences are nearly automatically affirmed. This is inconsistent with the unitary standard of review that *Booker* requires.

III. THE GUIDELINE RANGE IS UNWORTHY OF A PRESUMPTION OF REASONABLENESS BECAUSE, UNDER THE GUIDELINES' RELEVANT CONDUCT RULES AND PROCEDURAL ADVICE, THE GUIDELINE RANGE FREQUENTLY RESTS ON AN UNRELIABLE FACTUAL BASIS.

As experience makes plain, guideline calculations are often the product of unreliable, untested and unwarranted factual assumptions. This happens because the Guidelines require the use of a broad sweep of information to calculate the sentencing range without adequate procedural protections. The use of factually unreliable information to compute sentencing ranges is a constant risk and common occurrence. Such calculations are not worthy of a presumption of reasonableness.

Under U.S.S.G. § 1B1.3, applicable to the majority of cases sentenced in federal court today, and a host of cross-references like that applied in Victor Rita's case, the Guidelines require that uncharged, dismissed and acquitted offenses, often far afield of the offense of conviction, be used to calculate the guideline range.[18] That calculation is

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[18] *See, e.g., United States v. Rashaw*, 170 Fed. Appx. 986 (8th Cir. 2006) (affirming statutory maximum sentence of 30 years for defendant convicted of firearms offenses based on uncharged double

to be based on a preponderance of the "probably accurate" information, including hearsay. U.S.S.G. § 6A1.3, p.s. & comment (backg'd.). Seven courts of appeals attribute a presumption of reasonableness to the range thus "correctly calculated." *See, e.g., United States v. Romero*, ___ F.3d ____, 2006 WL 3530656, at *6, *9 (7th Cir. Dec. 8, 2006); *United States v. Smith*, 2006 WL 3068667, at *1 (5th Cir. Oct. 26, 2006) (unpublished); *United States v. Minter*, 2006 WL 3018109, at *1 (4th Cir. Oct. 23, 2006) (unpublished).

All courts of appeals have approved the use of uncharged, dismissed and acquitted separate offenses when determining the guideline range.[19] Most have held that in

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homicide to which firearms were unrelated); *United States v. Faust*, 456 F.3d 1342 (11th Cir. 2006) (affirming sentence for defendant convicted of distribution of cocaine based on distribution of ecstasy and firearms offense of which he was acquitted); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (affirming 360-month sentence for defendant convicted of drug trafficking offense subject to 27-33 month guideline sentence based on conduct of others in conspiracy of which he was acquitted); *United States v. Jardine*, 364 F.3d 1200 (10th Cir. 2004) (affirming 108-month sentence for defendant convicted of firearms possession subject to 18-24 month guideline sentence based on uncharged drug trafficking offense to which the firearm was unrelated).

[19] *See, e.g., United States v. Andreano*, 417 F.3d 967, 970 (8th Cir. 2005); *United States v. Fanfan*, 468 F.3d 7, 15 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2006); *United States v. Clark*, 179 Fed. Appx. 870, 871-72 (3d Cir. 2006); *United States v. Stewart*, 185 Fed. Appx. 276, 279 (4th Cir. 2006); *United States v. Angleton*, 2006 WL 2828657, at *1, *4 (5th Cir. Sept. 28,

doing so, a preponderance of the evidence standard may be used. At least one has held that a preponderance of the evidence standard *must* be used. *See United States v. Thorpe*, 447 F.3d 565, 569 (8th Cir. 2006) (vacating sentence based on drug quantity found by the jury beyond a reasonable doubt and remanding "for a determination of the drug quantity under a preponderance of the evidence standard and for the imposition of a sentence commensurate with the drug quantity determination"). Before and after *Booker*, hearsay may be used at sentencing,[20] and several courts of appeals treat the mere inclusion of allegations in a presentence report as evidence that may be used in calculating the guideline range unless the defendant comes forward with evidence to rebut the hearsay.[21]

2006) (unpublished); *United States v. Barevich*, 443 F.3d 956, 958-59 (7th Cir. 2006); *United States v. Flores-Flores*, 2006 WL 2269879, at *1 (9th Cir. Aug. 2, 2006) (unpublished); *United States v. Magallenez*, 408 F.3d 672, 678-79 (10th Cir. 2006); *United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006).

[20] *See United States v. Littlesun*, 444 F.3d 1196, 1198-1200 (9th Cir. (2006); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005).

[21] *See United States v. Caldwell*, 448 F.3d 287, 290-91 (5th Cir. 2006); *United States v. Daniel*, 178 Fed. Appx. 345, 346 (5th Cir. 2006); *United States v. Bobadilla-Diaz*, 176 Fed. Appx. 858, 859 (9th Cir. 2006); *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997);

These guideline-endorsed procedures and applications produce calculations that are routinely based on estimation and surmise rather than evidence. *See, e.g.*, *United States v. Jackson*, ___ F.3d ____, 2006 3436038, at *3, *9 (6th Cir. Nov. 30, 2006) (upholding as "reasonable" drug quantity "estimate" based on weighing four of eighteen pieces of crack cocaine); *United States v. Perez*, 183 Fed. Appx. 477, 479-80 (5th Cir. 2006) (upholding as "reasonable" probation officer's "extrapolation" of drug quantity by multiplying quantity of marijuana seized by number of times defendant crossed border).

And the information comes from untrustworthy and unchallengeable sources. As a typical example, a defendant pled guilty in the Northern District of Texas to conspiring to import more than 5 kilograms of cocaine and more than 1000 kilograms of marijuana. The presentence report, restating hearsay provided by the government, said the defendant was accountable for 155 kilograms of cocaine and 19,282 pounds of marijuana. *See* Brief of Appellant, *United States v. Murietta-Maldonodo*, 111 Fed. Appx. 253 (5th Cir. 2004) (No. 04-10177), available at 2004 WL 2966797, at *4. At the sentencing hearing, an agent testified that he was told the defendant "had a connection in California who supplied him with 25 kilograms of cocaine," admitted that he had no means of verifying the information and "that's as far as we went with it." *Id.* at *8-*9. The agent also testified that a cooperating witness had attributed 21 van loads of

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United States v. Terry, 916 F.2d 157, 160-62 (4th Cir. 1990).

marijuana to the defendant, and that another source, whose identity the agent would not disclose, had attributed another 10 to 20 van loads to the defendant. *Id.* at *5-*6.

Before *Booker*, the Fifth Circuit rejected the defendant's argument that the full quantity alleged in the presentence report used to sentence him to 327 months in prison was not supported even by a preponderance of reliable evidence, holding that the *defendant* "has not shown that the information in the Presentence Report (PSR) concerning the drug quantities involved in the offense was 'materially untrue, inaccurate, or unreliable.'" *United States v. Murietta-Maldonado*, 111 Fed. Appx. 253, 254 (5th Cir. 2004) (internal citations omitted). After *Booker*, the same sentence was held to be reasonable because when a judge "impose[s] a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines." *United States v. Murietta-Maldonado*, 161 Fed. Appx. 374, 375 (5th Cir. 2006) (internal citations omitted).[22]

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[22] *See also United States v. Taylor*, 184 Fed. Appx. 870 (11th Cir.) (affirming life sentence based on uncharged murder over defendant's objections to the use of hearsay and a preponderance of the evidence standard), *cert. denied*, 127 S. Ct. 311 (2006); *United States v. Patterson*, 2006 WL 2620174 (4th Cir. Sept. 13, 2006) (unpublished) (affirming 262-month sentence under cross-reference to first degree murder guideline for defendant convicted of conspiracy to possess crack with intent to distribute, based on finding by a preponderance that the defendant participated in a home invasion which resulted in death, though the jury acquitted him of participating in a firearms conspiracy factually based on the home

Such reasoning turns a blind eye to the traditional view that untested statements by self-interested witnesses are inherently unreliable. Recently a district judge took aim at this problem. In overturning the convictions of a mother and her sons obtained through false and collusive "snitch testimony," Judge Melancon found that the use of such testimony is "systemic," and called upon the Department of Justice to conduct an independent investigation into the problem. *See United States v. Colomb*, No. 02-CR-60015, Order Ruling on Defendant's Motion for New Trial (W.D. La. Aug. 31, 2006), available on PACER, Docket No. 531; *see also United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) ("In truth, [the] 'real conduct' . . . system relies on 'findings' that rest on a mishmash of data, including blatantly self-serving hearsay largely served up by the Department [of Justice].") (internal quotation marks and citations omitted). The Sentencing Commission itself has recognized the unreliability of the information often used to establish relevant conduct and the hidden disparity it creates. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50 (Nov. 2004) ("research suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators"), available at http://www.ussc.gov/15_year/15year.htm.

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invasion).

A presumption of reasonableness at least dissuades and at worst prohibits sentencing judges from blunting the impact of unreliable information on the ultimate sentence. *See United States v. Thorpe*, 447 F.3d 565, 567-68 (8th Cir. 2006) (district court erred by imposing sentence based on drug quantity found by the jury because of its discomfort with the severity of controlled substance laws and how little the government must prove in conspiracy cases). The presumption creates yet another system, like those struck down in *Blakely* and *Booker*, in which the equivalent of conviction is obtained absent the fundamental components of the adversary system the Framers intended. *See Blakely v. Washington*, 542 U.S.296, 305-08, 311-13 (2004); *United States v. Booker*, 543 U.S. 220, 230-44 (2005); *id.* at 273 (Stevens, dissenting in part); *id.* at 304 (Scalia, J., dissenting in part); *id.* at 319 n.6 (Thomas, J., dissenting in part); *see also Washington v. Recuenco*, ___ U.S. ____, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting) ("In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments.").

Without procedures sufficient to assure the reliability of the wide range of information a sentencing judge must consider in calculating the guideline range, a presumption of reasonableness is unwarranted and at odds with the holdings in *Blakely* and *Booker*.

CONCLUSION

According a presumption of reasonableness to within-Guideline sentences is inconsistent with *Booker* and the judgments of the courts of appeals in both No. 06-5618 and No. 06-5754 should be reversed.

Respectfully submitted,

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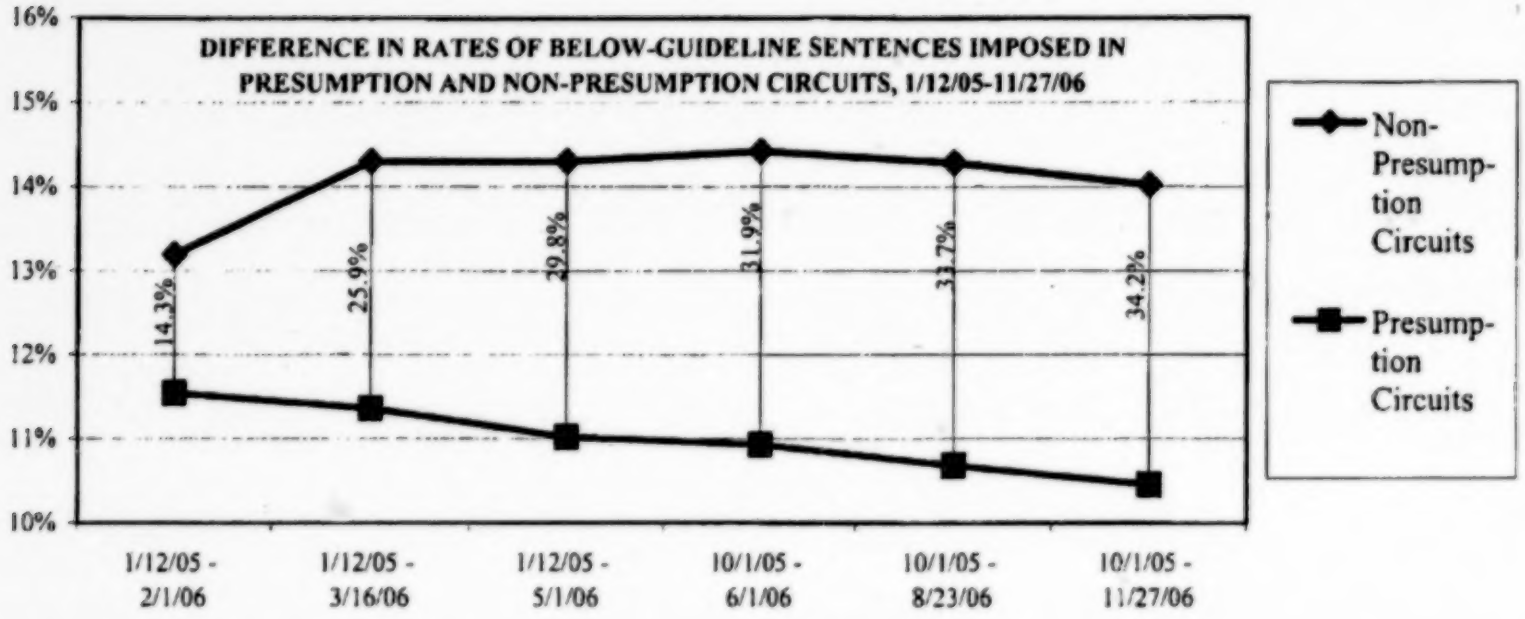
APPENDIX



The data used to prepare this chart was taken from the following reports: U.S. Sentencing Commission, Post-Booker Sentencing Updates, published Feb. 14, 2006, Mar. 30, 2006, May 24, 2006, July 11, 2006; Quarterly Sentencing Updates, published Aug. 30, 2006 and Dec. 6, 2006, available at http://www.ussc.gov/bf.htm. The lower line represents the number of below-guideline sentences imposed divided by the number of cases sentenced in circuits that had adopted a presumption of reasonableness before or during the respective period. The upper line represents the number of below-guideline sentences imposed divided by the number of cases sentenced in circuits that had not adopted a presumption of reasonableness before or during the respective time period. The percentage shown on the vertical line at each time period is the percentage by which the rate of below-guideline sentences for the circuits that had not adopted a presumption exceeded the rate of below-guideline sentences for the circuits that had adopted a presumption. The seven circuits to adopt a presumption did so in the following cases: *U.S. v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005), *U.S. v. Lincoln*, 413 F.3d 716 (8th Cir. July 7, 2005), *U.S. v. Mykytiuk*, 415 F.3d 606 (7th Cir. July 7, 2005), *U.S. v. Williams*, 436 F.3d 706 (6th Cir. Jan. 31, 2006), *U.S. v. Green*, 436 F.3d 449 (4th Cir. Feb. 6, 2006), *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. Feb. 17, 2006), *U.S. v. Dorcely*, 454 F.3d 366 (D.C. Cir. July 21, 2006).

BELOW GUIDELINE SENTENCES IMPOSED/CASES SENTENCED 1/12/2005-11/27/2006

Period	Nat'l	DC	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th
1/12/05-2/1/06	7951	61	258	870	536	688	1237	681	438	751	1326	498	607
	63631	472	1449	3768	3052	5679	14357	4902	2847	4809	11226	5197	5873
1/12/05-3/16/06	9328	70	303	1024	606	817	1415	788	508	830	1608	626	733
	74245	544	1705	4329	3459	6638	16643	5653	3320	5485	13303	6122	7044
1/12/05-5/1/06	10591	76	338	1331	687	904	1522	909	562	924	1806	705	827
	85568	612	1990	5661	3933	7622	19060	6496	3754	6255	15123	6964	8098
10/1/05-6/1/06	4877	39	127	616	293	405	646	440	244	452	873	382	360
	39508	272	939	2436	1739	3451	8866	3005	1760	3082	6947	3342	3669
10/1/05-8/23/06	6014	49	154	800	345	468	806	532	302	520	1109	475	454
	49560	345	1169	3122	2135	4397	11069	3651	2162	3676	8972	4213	4649
10/1/05-11/27/06	7935	68	210	983	450	598	1084	734	402	665	1463	646	632
	66802	449	1524	4012	2880	6007	15142	4918	2909	4972	11893	5748	6348

Source: U.S. Sentencing Commission, Post-Booker Sentencing Updates, published Feb. 14, 2006, Mar. 30, 2006, May 24, 2006, July 11, 2006; Quarterly Sentencing Updates, published Aug. 30, 2006 and Dec. 6, 2006, available at http://www.ussc.gov/bf.htm.

Presumption adopted shown in bold: *U.S. v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005), *U.S. v. Lincoln*, 413 F.3d 716 (8th Cir. July 7, 2005), *U.S. v. Mykytiuk*, 415 F.3d 606 (7th Cir. July 7, 2005), *U.S. v. Williams*, 436 F.3d 706 (6th Cir. Jan. 31, 2006), *U.S. v. Green*, 436 F.3d 449 (4th Cir. Feb. 6, 2006), *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. Feb. 17, 2006), *U.S. v. Dorcely*, 454 F.3d 366 (D.C. Cir. July 21, 2006).

DATA POINTS

Period	Non-Presumption Circuits	Presumption Circuits	Difference Between Presumption and Non-Presumption
1/12/05 - 2/1/06	13.2%	11.5%	14.3%
1/12/05 - 3/16/06	14.3%	11.4%	25.9%
1/12/05 - 5/1/06	14.3%	11.0%	29.8%
10/1/05 - 6/1/06	14.4%	10.9%	31.9%
10/1/05 - 8/23/06	14.3%	10.7%	33.7%
10/1/05 - 11/27/06	14.0%	10.5%	34.2%

RATES OF BELOW-GUIDELINE SENTENCES IMPOSED 1/12/05-11/27/06 - DATA

Period	Nat'l	DC	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Pre-sump-tion Circuits	Pre-sump-tion %	Non-Pre-sump-tion Circuits	Non-Pre-sump-tion %	Nat'l %
1/12/05-2/1/06	7951	61	258	870	536	688	1237	681	438	751	1326	498	607	3107	11.54	4844	13.19	12.50
	63631	472	1449	3768	3052	5679	14357	4902	2847	4809	11226	5197	5873	26915		36716		
1/12/05-3/16/06	9328	70	303	1024	606	817	1415	788	508	830	1608	626	733	4984	11.36	4344	14.30	12.56
	74245	544	1705	4329	3459	6638	16643	5653	3320	5485	13303	6122	7044	43861		30384		
1/12/05-5/1/06	10591	76	338	1331	687	904	1522	909	562	924	1806	705	827	5526	11.02	5065	14.30	12.38
	85568	612	1990	5661	3933	7622	19060	6496	3754	6255	15123	6964	8098	50151		35417		
10/1/05-6/1/06	4877	39	127	616	293	405	646	440	244	452	873	382	360	2569	10.93	2308	14.42	12.34
	39508	272	939	2436	1739	3451	8866	3005	1760	3082	6947	3342	3669	23506		16002		
10/1/05-8/23/06	6014	49	154	800	345	468	806	532	302	520	1109	475	454	3152	10.68	2862	14.28	12.13
	49560	345	1169	3122	2135	4397	11069	3651	2162	3676	8972	4213	4649	29513		20047		
10/1/05-11/27/06	7935	68	210	983	450	598	1084	734	402	665	1463	646	632	4197	10.45	3738	14.02	11.88
	66802	449	1524	4012	2880	6007	15142	4918	2909	4972	11893	5748	6348	40145		26657		

COURT OF APPEALS REVIEW

12/1/05-11/30/06

The following analysis covers the period December 1, 2005 through November 30, 2006. It includes published and unpublished decisions in the Westlaw database responsive to the following search: "SENTENCING GUIDELINES" & DA(AFT 11/30/2005 & BEF 12/1/2006) & (REASONABLE! UNREASONABLE! 3553(A) ADVISORY). It includes only cases in which either the government or the defendant appealed the sentence on the basis of it being unreasonable under 18 U.S.C. § 3553(a) (including appeals on the basis that the district court failed adequately to articulate reasons for the sentence imposed), or in which the court of appeals addressed the reasonableness of the sentence *sua sponte*.

Parameters were established to ensure consistency. Appeals based solely on a claimed error in calculating the guideline range or clear error in fact-finding in support of the guideline range were not included (even if a party or the court said that for that reason, the sentence was unreasonable). Appeals of a grant, denial or extent of a departure described in the Guidelines Manual were included. Cases in which 18 U.S.C. § 3553(a) played no role because a mandatory minimum statute dictated the sentence were not included. Cases involving sentences imposed before *Booker* was decided were not included unless the court of appeals determined not only whether there was *Booker* error (including plain error), but whether

the sentence was reasonable. Fines, terms of supervised release, and sentences for supervised release and probation violations that met the above parameters were included.

Each case meeting the above parameters was coded according to whether the sentence imposed was within, above or below the guideline range, the party who appealed, and the result of the appeal. Multi-defendant cases were counted for each sentence meeting the above parameters, as were cases in which a defendant had more than one type of sentence meeting the above parameters (*e.g.*, a within-guideline prison term for the instant offense and an above-guideline prison term for revocation of supervised release or probation that had been imposed for a prior offense). The categories are:

1. Within-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

2. Within-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

3. Above-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

4. Above-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

5. Below-guideline sentence appealed by government.
   a. Affirmed
   b. Reversed

6. Below-guideline sentence appealed by defendant.
   a. Affirmed
   b. Reversed

Of the 1,534 sentences identified through the above search parameters, 1,049 were appeals from within-guideline sentences, 254 were appeals from above-guideline sentences, and 231 were appeals from below-guideline sentences. The following charts compare the information obtained from a review of those cases. A document that includes the charts below and the entire list of cases is posted at:

www.fd.org/CourtofAppealsReview12.1.05-11.30.06.

NATIONAL RESULTS

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	1034 / 1049 (98.6 %)	15 / 1049 (1.4 %)	Within Guideline	0/0	0/0
Above Guideline	245 / 254 (96.5 %)	9 / 254 (3.5 %)	Above Guideline	0/0	0/0
Below Guideline	146 / 148 (98.6 %)	2 / 148 (1.4 %)	Below Guideline	18 / 83 (21.7 %)	65 / 83 (78.3 %)

FOURTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	197 / 197 (100 %)	0 / 197 (0 %)	Within Guideline	0/0	0/0
Above Guideline	23 / 25 (92 %)	2 / 25 (8 %)	Above Guideline	0/0	0/0
Below Guideline	18 / 18 (100 %)	0 / 18 (0 %)	Below Guideline	0 / 11 (0 %)	11 / 11 (100 %)

EIGHTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed (%)	Sentence Reversed (%)	**Government Appeals Sentence**	Sentence Affirmed (%)	Sentence Reversed (%)
Within Guideline	84 / 85 (98.8 %)	1 / 85 (1.2 %)	Within Guideline	0/0	0/0
Above Guideline	30 / 31 (96.8 %)	1 / 31 (3.2 %)	Above Guideline	0/0	0/0
Below Guideline	18 / 18 (100 %)	0 / 18 (0 %)	Below Guideline	2 / 28 (7.1 %)	26 / 28 (92.9 %)

COMPARISON OF CIRCUITS WITH AND WITHOUT A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINE SENTENCES

1. RATIO OF REVERSALS FOR WITHIN- AND OUTSIDE-GUIDELINE SENTENCES

	All Circuits	Non-Presumption Circuits Only[1]	Presumption Circuits Only[2]
Within Guideline Sentences	15 / 1049 reversed (1.4 %)	9 / 372 reversed (2.4 %)	6 / 677 reversed (0.9%)
Outside Guideline Sentences	76 / 485 reversed (15.7 %)	18 / 206 reversed (8.7 %)	58 / 279 reversed (20.8 %)

2. RATIO OF REVERSALS FOR GOVERNMENT APPEALS OF BELOW- GUIDELINE SENTENCES

	All Circuits	Non-Presumption Circuits Only	Presumption Circuits Only
Sentence Affirmed	18 / 83 (21.7 %)	10 / 25 (40 %)	8 / 58 (13.8 %)
Sentence Reversed	65 / 83 (78.3 %)	15 / 25 (60 %)	50 / 58 (86.2 %)

RESULTS BY CIRCUIT

DISTRICT OF COLUMBIA

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	2	0	Within Guideline	0	0
Above Guideline	0	0	Above Guideline	0	0
Below Guideline	0	0	Below Guideline	0	0

FIRST CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	23	0	Within Guideline	0	0
Above Guideline	2	1	Above Guideline	0	0
Below Guideline	5	0	Below Guideline	0	4

SECOND CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	38	1	Within Guideline	0	0
Above Guideline	14	0	Above Guideline	0	0
Below Guideline	13	0	Below Guideline	1	2

THIRD CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	60	2	Within Guideline	0	0
Above Guideline	15	0	Above Guideline	0	0
Below Guideline	20	0	Below Guideline	0	1

FOURTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	197	0	Within Guideline	0	0
Above Guideline	23	2	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	0	11

FIFTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	62	0	Within Guideline	0	0
Above Guideline	54	1	Above Guideline	0	0
Below Guideline	3	1	Below Guideline	0	5

SIXTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	87	1	Within Guideline	0	0
Above Guideline	14	3	Above Guideline	0	0
Below Guideline	12	0	Below Guideline	4	2

SEVENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	169	1	Within Guideline	0	0
Above Guideline	13	0	Above Guideline	0	0
Below Guideline	8	0	Below Guideline	2	5

EIGHTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	84	1	Within Guideline	0	0
Above Guideline	30	1	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	2	26

NINTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	72	6	Within Guideline	0	0
Above Guideline	24	1	Above Guideline	0	0
Below Guideline	20	1	Below Guideline	4	2

TENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	70	3	Within Guideline	0	0
Above Guideline	9	0	Above Guideline	0	0
Below Guideline	11	0	Below Guideline	0	1

ELEVENTH CIRCUIT

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	**Government Appeals Sentence**	Sentence Affirmed	Sentence Reversed
Within Guideline	170	0	Within Guideline	0	0
Above Guideline	47	0	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	5	6

END NOTES

1. The First, Second, Third, Ninth, and Eleventh Circuits have not adopted a presumption of reasonableness for within-guideline sentences.

2. The District of Columbia and the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have adopted a presumption of reasonableness for within-guideline sentences.